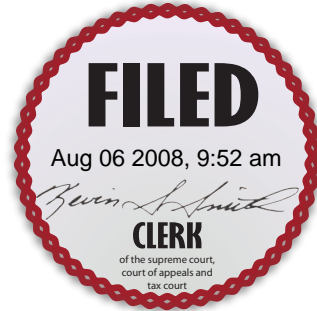


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SHAWANNA BUTLER

Appellant,

vs.

ST. JOSEPH COUNTY DEPARTMENT
OF CHILD SERVICES

Appellee.

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No. 71A03-0803-JV-109

APPEAL FROM THE ST. JOSEPH COURT
The Honorable J. Eric Smithburn, Special Judge
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0703-JT-37
71J01-0703-JT-38
71J01-0703-JT-39
71J01-0703-JT-40
71J01-0703-JT-41
71J01-0703-JT-42

August 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Shawanna B. (Mother) appeals the involuntary termination of the parent-child relationship with her four daughters, A.B., I.B., S.B., and T.B., and two sons, J.L.B. and J.K.B. (collectively, the Children). Mother presents the following restated issue for review: Did the St. Joseph County Department of Child Services (DCS) present clear and convincing evidence to support the termination of Mother's parental rights to the Children?

We affirm.

Mother is the biological mother of eight children, the following six of whom are involved in this current parental termination proceeding: J.L.B., born October 12, 1998; T.B., born January 13, 2000; S.B., born June 30, 2002; I.B., born May 19, 2003; J.K.B., born April 18, 2004; and A.B., born March 27, 2005.¹ Mother's other two children, N.B., born December 30, 2000, and M.L., born February 18, 2006, are not part of this appeal but will be discussed as necessary in the presentation of the facts.

Mother married Jerome B. in 1997, and their relationship involved domestic violence to the point that the police were called multiple times. Mother worked full time as a licensed practical nurse (LPN) and left the Children in the care of Jerome B., who was unemployed, had a criminal history, and was on house arrest from a drug conviction. Jerome B. used illegal drugs in their home when the Children were present, and Mother was aware of that fact.

On March 16, 2004, the police—after having made several drug buys from Jerome B. at Mother and Jerome B.'s house—executed a search warrant on the house. At that time,

¹ Jerome B. is the father of J.L.B., T.B., S.B., I.B., and J.K.B.; and Michael L. is the father of A.B. The parental rights of the Children's fathers were also terminated, but these fathers are not parties to this appeal.

Mother was at work, and Jerome B. was at home alone with five-year-old J.L.B., four-year-old T.B., three-year-old N.B., one-year-old S.B., and nine-month-old I.B. The police found drugs in the house, and Jerome B. admitted that he had used drugs that morning. The police arrested Jerome B., called the DCS, and transported these five children to the emergency room.

Two DCS family case managers, Leticia Cole-Stallings and Christine Beckman Johnson, went to the emergency room, met with the five children, and observed that some of the children had bruises and marks on them from where Jerome B. had hit them with various objects. Specifically, N.B. had a bump on his forehead as well as marks and burns on his face. N.B. also had loop-shaped marks on his arms, hands, neck, legs, feet, buttocks, back, stomach, and genitals. J.L.B. had loop-shaped marks on his chest, back, neck, and arm that appeared to be scars rather than fresh injuries. T.B. had marks, which also appeared to be scars, on her stomach, arm, and back. The loop-shaped marks on these children were consistent with being hit by an extension cord.

J.L.B, T.B., and N.B. told the DCS workers that Jerome B. had “whooped” them multiple times and that he had spanked the two younger children, S.B. and I.B. *Transcript at 45.* Jerome B. “admitted to whooping them several times.” *Id.* The DCS workers also talked with Mother, who was called to the hospital from her work, about the marks and bruises on the children, and Mother indicated that she was aware of the marks on the children and had seen Jerome B. go to hit the children. Mother knew that Jerome B. was physically violent, and he had threatened to kill her in the past.

The five children were detained, and the DCS gave Mother a list of things she needed

to do—which included completing a parenting assessment, participating in home-based services and individual counseling for herself and the children who were verbal,² and having no contact with Jerome B.—in order to have J.L.B., T.B., N.B., S.B., and I.B. placed safely back in her home. Mother set up the required appointments for services within fourteen days, which was the time period for the DCS to file a child in need of services (CHINS) petition. The DCS worked with its Child Protection Team to arrange services for Mother, placed these five children back in Mother’s care, and did not file any CHINS petitions at that time.³

On April 18, 2004, which was about a week after the five children were returned to Mother’s home, Mother gave birth to her sixth child, J.K.B. In the beginning of May 2004, after N.B. experienced some acting-out behaviors, the DCS removed N.B. from Mother’s home and placed him in a therapeutic foster home so he could receive more extensive counseling and Mother could give more attention to the remaining children.⁴

Mother chose to have Mother’s own mother, Deborah Stuckey (Grandmother)—who is an alcoholic and had been verbally abusive and violent toward Mother when Mother was a child—move in with her and watch Mother’s children while she worked. While Grandmother was babysitting for J.L.B., T.B., S.B., I.B., and J.K.B., she spanked them, locked them in the basement with a dog they feared, and told them there were dead children in the basement. Mother was aware of what Grandmother was doing. The DCS did not find out about Grandmother’s actions until May 2005 and, thereafter, substantiated neglect against

² The verbal children included J.L.B., T.B., N.B. and S.B.

³ The DCS did, however, file a CHINS petition for N.B. As previously stated, N.B. is not part of this termination.

Grandmother.

On June 7, 2004, the DCS filed petitions alleging that J.L.B., T.B., S.B., and I.B. were CHINS. The DCS did not file a CHINS petition for two-month-old J.K.B. These children remained in Mother's home, and Mother admitted that these children were CHINS. In July 2004, the trial court determined J.L.B., T.B., S.B., and I.B. were CHINS and ordered Mother to, among other things, participate in individual counseling, cooperate with home-based services, maintain stable employment and housing, and maintain consistent contact with the DCS. Mother complied with the trial court's dispositional order by working with home-based services, maintaining full-time employment, and attending counseling.

In December 2004, Mother took some of the children, including J.K.B., to the pediatrician, Dr. Laurel Pramuk. At this visit, eight-month-old J.K.B. weighed fifteen pounds, four ounces and was showing signs of growth failure or failure to thrive. Dr. Pramuk instructed Mother to increase J.K.B.'s caloric intake, to take him for laboratory studies to evaluate the cause of his failure to thrive, and to return for a follow-up visit two weeks later. Mother did not take J.K.B. for any lab tests and did not make any follow-up appointments even after Dr. Pramuk telephoned Mother to remind her about the importance of getting the labs done. Mother also failed to keep S.B. and I.B. current with their immunizations and well-baby checks.

On March 27, 2005, Mother gave birth to her seventh child, A.B. Dr. Pramuk was the doctor on call at the hospital at that time, and while Dr. Pramuk examined A.B., she asked

⁴ N.B. was determined to be a CHINS and was later adopted by his therapeutic foster parents following Mother's consent to the adoption.

Mother about J.K.B. and instructed Mother to bring J.K.B. to her office when she came in for her first visit for A.B. On April 11, 2005, Mother took J.K.B. to Dr. Pramuk's office. At that time, J.K.B., who was one year old,⁵ weighed a mere eleven pounds. He also did not have any linear growth from his previous visit. J.K.B. "was extremely cachectic looking, his skin was just hanging off of him." *Transcript* at 342. Dr. Pramuk admitted J.K.B. to the hospital for severe malnutrition and dehydration. J.K.B.'s failure to thrive was not related to any organic cause and was environmental and caused by him being deprived of food and water for days while in Mother's care. At the time of his admittance, J.K.B. was in impending renal failure from dehydration and malnutrition, and he was within a few days of death if he had not been given fluids. J.K.B. spent one week in the hospital and gained six pounds by the time he went to his first follow-up visit in Dr. Pramuk's office on April 25, 2005.

Thereafter, the DCS filed petitions alleging J.K.B. and A.B. were CHINS and removed J.L.B., T.B, S.B., I.B., and A.B. from Mother's home. The trial court modified the dispositional order for J.L.B., T.B., S.B., and I.B., ordering them to be placed in foster care, and it appointed a CASA. It was around this time that DCS became aware of the allegations against Grandmother and substantiated the neglect against her. Mother was also instructed to have Grandmother move out of the house, and the trial court ordered that Grandmother was not to have any contact with Mother's children. At the initial CHINS hearing for J.K.B. and A.B., Mother admitted that J.K.B. was a CHINS but denied that A.B. was a CHINS. The trial court determined that J.K.B. was a CHINS and set a fact-finding hearing as to A.B. At the subsequent fact-finding hearing, held in February 2006, Mother admitted that A.B. was a

⁵ J.K.B. was five days shy of his first birthday.

CHINS.

While the Children were in foster care, Mother continued to comply with services, such as attending individual counseling and supervised visitation with the Children at Family First Center (FFC). Initially, Mother's visits with the Children at FFC went well but later deteriorated somewhat. The visits were often "extremely loud" and "very chaotic", and the Children often "distressed" during much of the visits and exhibited "ongoing problems with screaming and crying" that was not typical or usual in such visitation. *Id.* at 214. J.L.B. was sometimes stressed during visitations and demanded lots of attention; T.B. was frequently sad and withdrawn and would suck her thumb; S.B. and T.B. expressed fears of being alone, being in the dark, and being in confined places; J.K.B. sometimes would dig in the trash for food and would have a tantrum, including hitting, biting, and spitting, if he did not get his food fast enough or if food was taken away from him; A.B. would sit quietly for long periods of time and was not active like a typical toddler. At times, Mother had problems with hygiene, including making sure the Children were washing their hands, cleaning up, and leaving open dirty diapers in the bathroom.

In mid-February 2006, the DCS placed ten-month-old A.B. back in Mother's home because the DCS was concerned about Mother having sufficient bonding and parenting time with A.B. At the time A.B. was returned to Mother, A.B. was growing well and was at the fiftieth percentile on the weight curve for a child of her age. Approximately one week after A.B. was returned to Mother's care, Mother gave birth to her eighth child, M.L.⁶ When Mother became pregnant with M.L., she did not tell the DCS and instead waited until

approximately one month before giving birth. Mother claimed that she did not know she was pregnant with M.L.

In an effort to allow Mother to spend more time with the Children, the DCS set up a “waiver account”, which allowed Mother to quit working and still have her expenses paid by the DCS. *Id.* at 107. The DCS also increased the amount of time the home-based workers were present in Mother’s home so that they would be there five days per week. Mother continued to participate in individual counseling, home-based services, and supervised visitation with the other children who were in foster care.

Around this same time, Michael L., who is the father of A.B. and M.L., moved into Mother’s house. The DCS conducted an investigation into Michael L.’s background, including criminal history, driving record, and child support history, and incorporated him into the CHINS cases because of his involvement with the family. The DCS assisted Michael L. in finding a job, set up parenting classes for him to attend with Mother, and allowed him to participate with Mother in supervised visitations. Michael L., however, dropped out of parenting classes, did not attend visitations, and lost his job and did not inform the DCS.

In October 2006, the DCS learned that Mother had called the police on Michael L. when, while intoxicated, he tried to force his way into Mother’s house. Apparently, Mother had made multiple 911 calls to police regarding domestic violence involving Michael L. Grandmother also called police to report that Michael L. had threatened Mother with a gun. Even after Mother had called the police to report the domestic violence, she allowed Michael

⁶ Again, M.L., whose father is Michael L., is not part of this termination.

L. to babysit her children and advocated for him to have visitation with his two children. Following these discoveries, the DCS removed A.B. and M.L. from Mother's home. During the nine months that A.B. lived with Mother, A.B. gained only two pounds and dropped to the tenth percentile on the weight curve for a child of her age. A.B. also regressed when she was living with Mother, and she became withdrawn and lethargic, would not laugh or giggle, and became uninterested in people and toys.

Thereafter, from around November 2006 to approximately January 2007, Mother "disappeared" and did not participate in visitation with the Children or maintain contact with the DCS. *Id.* at 116. Once the DCS family case manager was able to track down Mother, she informed the DCS that she had moved from South Bend to Indianapolis so she could get away from people in South Bend. Mother claimed she was going to commute from Indianapolis to South Bend to participate in visitation and counseling services. Mother, however, eventually moved back to South Bend.

Once Mother moved back, she and a woman named Mary Mack moved into a house together. Since that time, there have been a few 911 calls made to the police from Mother's house, including one where two females were arguing and the caller reporting that "Mary has a knife." *Id.* at 182.

On March 26, 2007, the DCS filed petitions to terminate Mother's parental rights to the Children. The trial court held termination hearings on August 27, August 29, and September 5, 2007. Mother testified and admitted that in 2004 she was aware that Jerome B. had been hitting the children.

Following the termination hearing, the trial court issued an order terminating Mother's

parental rights to the Children. The trial court's order included extensive findings and conclusions in support of its order to terminate Mother's parental rights. Specifically, the trial court found, in relevant part:

98. As of the date of trial, Mother continues to be incapable of caring and protecting [J.L.B., T.B., S.B., I.B., J.K.B., and A.B.].

99. Despite approximately 3 1/2 years of individual counseling, and intensive daily in-home services . . . , when the children were placed in her care, Mother has not learned how to parent and protect [J.L.B., T.B., S.B., I.B., J.K.B., and A.B.].

* * * * *

112. [J.L.B., T.B., S.B., I.B., J.K.B., and A.B.] are traumatized children, as the result of a pattern of extensive physical and emotional abuse, medical and nutritional neglect and lack of supervision the children have suffered in Mother's care since 2004.

* * * * *

159. Mother is unable to provide a safe and stable home environment for [J.L.B., T.B., S.B., I.B., J.K.B., and A.B.].

160. From 3-16-04 to the present date, DCS has made in excess of [sic] reasonable efforts to reunify Mother with the children.

161. Reunification of [J.L.B., T.B., S.B., I.B., J.K.B., and A.B.] with Mother poses a substantial risk to the children's physical and mental well-being and is not in the best interests of the children.

Appellant's Appendix at 30-31, 34. The trial court concluded, in part, that there was a reasonable probability that the conditions that resulted in the Children's removal or the reasons for their placement outside the home would not be remedied and that continuation of the parent-child relationship posed a threat to the Children's well-being. Mother now appeals.

A parent's interest in the care, custody, and control of his or her children is "perhaps the oldest of the fundamental liberty interests", and is protected by the Fourteenth

Amendment to the United States Constitution. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005) (quoting *Troxel v. Granville*, 530 U.S. 57 (2000)).

Parental interests are not absolute, however, and must be subordinated to the child's interests in determining whether to terminate parental rights. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143. Thus, "[p]arental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities." *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. "[A] trial court does not need to wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship." *Castro v. Ind. Office of Family & Children*, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), *trans. denied*. When the evidence shows that the emotional and physical development of a child is threatened, termination of parental rights is appropriate. *Castro v. Ind. Office of Family & Children*, 842 N.E.2d 367.

Ind. Code Ann. § 31-35-2-4(b)(2) (West, PREMISE through 2007 1st Regular Sess.) sets out the following relevant elements that the DCS must allege and prove by clear and convincing evidence in order to terminate the parent-child relationship:

- (A) [o]ne (1) of the following exists:
 - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
* * * * *
- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Because subsection (b)(2)(B) is written in the disjunctive, the trial court need only find either that the conditions causing removal will not be remedied or that the continuation of the parent-child relationship poses a threat to the child. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143.

When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. *Id.* We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* Where, as here, the trial court enters findings of fact and conclusions thereon in granting the petition to terminate, we apply a two-tiered standard of review. We first determine whether the evidence supports the findings, and then whether the findings support the judgment. *Id.* We will not set aside a trial court's order to terminate parental rights unless it is clearly erroneous. *Id.*

Mother argues the DCS failed to prove that there was a reasonable probability that the continuation of the parent-child relationship posed a threat to the well-being of the Children.⁷

The trial court should judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *A.F. v.*

⁷ Mother also argues that the trial court erred by finding that there was a reasonable probability that the conditions that resulted in the Children's removal or the reasons for their placement outside the home will not be remedied. As noted above, I.C. § 31-35-2-4(b)(2)(B) required the DCS to demonstrate by clear and convincing evidence a reasonable probability that *either*: (1) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied, *or* (2) the continuation of the parent-child relationship poses a threat to the well-being of the child. Because we conclude that clear and convincing evidence supports the trial court's conclusion that continuation of the parent-child relationship poses a threat to the Children's well-being, we need not review whether the evidence supports the trial court's conclusion that a reasonable probability exists that the conditions that resulted in the Children's removal will not be remedied. See *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143.

Marion County Office of Family & Children, 762 N.E.2d 1244 (Ind. Ct. App. 2002), *trans. denied*. “However, a parent’s habitual patterns of conduct must also be considered to determine whether there is a substantial probability of future neglect or deprivation.” *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. Termination of parental rights can be appropriate not only where the child is in immediate physical danger, but also where the child’s emotional and physical development is threatened. *In re M.B.*, 666 N.E.2d 73. The trial court need not wait until the child is irreversibly harmed such that his or her physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *In re R.S.*, 774 N.E.2d 927 (Ind. Ct. App. 2002), *trans. denied*.

Here, the record reveals that Mother left five of her children in the care of Jerome B., whom Mother knew used drugs in the home. Some of these five children were beaten to the point of leaving marks and scars on their bodies. Mother knew about it and did nothing. The DCS gave Mother a chance, returned the five children to Mother, and provided Mother with extensive services. Mother, however, choose to have Grandmother—who mother knew was an alcoholic and capable of verbal and physical violence—babysit for these children. During this time period, these children were again subjected to physical abuse and were locked in a basement. Again, Mother knew what was happening and did nothing to protect her children. Mother, who was an LPN, allowed J.K.B. to become dehydrated and malnourished and deteriorate to the point of near-death. Thereafter, the DCS gave Mother another chance by returning A.B. to her home and providing Mother with extensive services, including a waiver account, so that she could quit work and work solely on being a mother to her children. A.B., however, did not thrive in Mother’s care, and Mother exposed A.B. to a potentially violent

environment.

During the termination hearing, William Horton, one of the DCS family case managers who worked with Mother, discussed Mother's failure to protect the Children and the threat to the Children's well-being. Horton explained how the DCS had offered Mother "multiple services" for an extended time period, had gone to "great lengths of supporting mom as far as her environment", and tried to provide her with the chance and ability to maintain that environment. *Transcript* at 120. Horton acknowledged that Mother had worked with the DCS and participated in multiple services but stated that Mother still had not shown that she could protect the Children.

After [Mother] had seen, several times, how the failure of her support around her caused her and her children harm and destruction, for her to even come close to allowing that to happen again, show [sic] this Department that mom was not able to protect these children adequately.

* * * * *

. . . [Mother] has shown over and over, while mother - - and mother knows I've commented to her before how well she has done to try to fight and get her children back. However, I think it's [sic] blatantly obvious, um, that mom still has not gotten the message of how to adequately protect her children from other people.

* * * * *

Mother has had three years to prove that [a threat to the Children's well-being] was no longer a problem, and she has failed to do that, when she really should have been given fifteen months to show that. But she's been given three years to prove that she would not fall in that situation again, and she's failing [sic] to it at least twice since we've had the case open.

Id. at 120, 125.

Dr. Alan Wax, the psychologist who conducted two psychological assessments of Mother, testified that Mother was hard working and had scored extremely well on the parenting assessment but stated that he "would be gravely concerned about the safety of the

children” while in Mother’s care. *Id.* at 398. He testified that Mother had failed to acknowledge or take responsibility for the physical abuse of the Children or for the malnutrition of J.K.B. and that she could not stay out of relationships and had a “tendency to get into relationships with people who could put her children at risk.” *Id.* at 397.

Additionally, Peggy Rose—who was the parenting class instructor and the therapeutic visitation supervisor at FFC and who observed approximately 350 hours of visitation between Mother and the Children—also acknowledged that Mother had scored well on her written parenting test, had excellent participation in her parenting class, and could learn parenting techniques, but Rose indicated that Mother did not follow through on the parenting techniques and was not able to consistently apply the parenting techniques to real life. Rose explained that the Children presented as traumatized children and that they had issues with anger. Rose testified that safety was one of her concerns about Mother when supervising the Children.

The CASA, who spent approximately 1,500 hours on this case, also testified that Mother’s ability to keep the Children safe and her ability to adequately parent them was “impaired” and that the parental relationship posed a threat to the Children’s well-being. *Id.* at 174. J.L.B. and T.B.—who were eight years old and seven years old, respectively, at the time of the termination hearing—informed the CASA that they wanted to be adopted. The pediatrician, Dr. Pramuk, also opined that the Children would be in danger if they were with Mother and that they do much better when not in Mother’s care.

The trial court’s determination that continuation of the parent-child relationship poses a threat to the Children’s well-being is not clearly erroneous. The evidence sufficiently

supports the trial court's decision to terminate the parent-child relationship between Mother and the Children.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur